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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

ALLEN M. WAMSLEY, et al .

PETITIONERS

V.

CHAMPLIN REFINING & CHEMICALS, INC., et al

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Robert E. Goodman, Jr.
Counsel of Record

5956 Sherry Lane
Suite 800
Dallas, Texas 75225
(214) 368-1765
(214) 368-3974 (telecopy)

6088

QUESTIONS PRESENTED

1. Whether the Older Workers Benefit Protection Act (the "OWBPA"), in amending the Age Discrimination in Employment Act (the "ADEA") to specify that an employee "may not" waive a claim under the ADEA without compliance with certain statutory requirements, prevents an employer who obtains releases from employees in violation of those requirements from seeking to bar the assertion of claims by such employees under the ADEA.

2. Whether, as a matter of the federal law of preemption, an employer who obtains releases from employees under circumstances in which the OWBPA specifies that an employee "may not" waive an ADEA claim may nevertheless rely on the state common law doctrine of ratification of contracts to bar an ADEA claim based on the receipt of any consideration by the employee in connection with the prohibited release.

3. Whether the application of the state common law doctrine of ratification to the ADEA is precluded as a matter of federal common law by the decision of this Court in Hogue v. Southern Railway Company, 390 U.S. 516 (1968).

STATEMENT UNDER RULE 29.1

In accordance with Rule 29.1 of the Rules of this Court, Petitioners state that there are no persons other than themselves or their spouses, or to their knowledge, Respondents, with an interest in the outcome of this case. Petitioners are not aware of the parents, subsidiaries or affiliates of Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the court of appeals in this case:

OPINIONS BELOW

The opinion of the court of appeals (App. 1a - 20a) is reported at 11 F. 3d 534. The order of the court of appeals overruling a suggestion for rehearing en banc (App. 27a - 28a) is unreported. The opinion of the district court (App. 21a - 26a) is not reported in Federal Supplement, but is electronically reported at 1992 U.S. Dist. LEXIS 22021.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1993. A suggestion of rehearing en banc was denied on September 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 201 of the Older Workers' Benefit Protection Act, 104 Stat. 978, 983-4 (Oct. 16, 1990) (the "OWBPA"), added a new subsection (f) to Section 7 of the Age Discrimination in Employment Act of 1967 ("ADEA"). This provision, codified at 29 U.S.C. §626(f), is included in full in the Appendix (App. 29a - 31a).

STATEMENT

Factual Background

Petitioners Allen M. Wamsley ("Wamsley"), Donald Whittenberg ("Whittenberg"), Anthony J. Nagy ("Nagy"), Betty R. Sanderson ("Sanderson") and Glenda K. Bennett ("Bennett") were terminated as employees of the Las Colinas, Texas office of Champlin Refining & Chemicals, Inc. ("Champlin"), an affiliate of respondent Citgo Petroleum Corp. ("Citgo"), in December 1990. As of their respective dates of termination, each of Petitioners Nagy, Whittenberg and Wamsley was 49 with over 10 years of service and Petitioners Sanderson and Bennett were over 50 and just months short of 10 years of service.

In the first half of November, 1990, Petitioners and other Champlin employees were advised of their respective dates of termination and received a letter concerning the terms of the Termination Pay Plan for Salaried Employees of Champlin

Refining & Chemicals, Inc. Located in the Company's Las Colinas Office. Upon being informed of special benefits available to employees over fifty with ten years of service, Petitioners requested that the conditions under which such special benefits were granted be modified to permit similar benefits to them. Alternatively, Petitioners requested that they be permitted to continue their employment with Champlin or Citgo, an alternative offered to other Champlin employees, and to move at their individual expense, if necessary, to another Champlin office or Citgo's headquarters so that they could be employed for sufficient additional months to become entitled to such special pension benefits. No formal response was made by any of Respondents to their requests.

Shortly after receipt of the letters concerning their respective dates of termination, between 15 and 40 days prior to such dates, each of the Petitioners received a second letter concerning their respective termination pay. Attached to the letter was a notice relating to a release of claims against Champlin. The notice specified that the employee had the statutorily required 45 day period to consider the release and a 7 day period after signing the release to revoke it.

Notwithstanding the notices, Petitioners were advised that they must, in all events, sign and return the releases in each case less than 45 days after receiving the letter and notice in order to receive the specified termination pay. Both Wamsley and Nagy were advised by Robert O. McAlister ("McAlister"), Champlin's vice-president for human resources, that they must sign and return the requested releases by their common termination date of November 30, 1992 to receive termination pay. The period thus provided for their consideration of the release was limited to 23 days, not the 45 days specified in the notices relating to the releases or required under §626(f)(1)(F)(ii). Wamsley and Nagy was further told by McAlister and Champlin's general counsel, Michael K. Williams, that they must return the releases at least 7 days prior to their termination date in order to receive termination

pay on such date, further limiting to 13 days the actual permitted period of consideration of the releases in the case of Wamsley and Nagy. Nagy was also specifically told by McAlister, 10 days prior to his termination date, that he could not count on payment of termination pay if he did not return his release as indicated, stating "if you don't sign the release before you leave, we don't know if or when you will receive termination pay", or words to that effect. Another employee of Champlin not among the Petitioners, Robert R. Avery ("Avery"), was also told by McAlister that he must return his release within the period stated in order to receive termination pay.

The other Petitioners, Whittenberg, Sanderson and Bennett, were similarly advised by McAlister that they must return the releases prior to 45 days in order to obtain termination pay. In each case, the period between the date of the notice and the termination was 40 days, again less than the 45 days specified in the notice and required by the OWBPA.

At the time of the deadlines imposed upon Petitioners to deliver their releases, none of the Petitioners had a more than limited income apart from their Champlin salary. Further, none of the Petitioners then had other employment and, unlike those Champlin employees offered employment with Citgo or those Champlin employees with 10 years of service and 50 years of age, could not expect any immediate substitute income. They were, as a result, economically compelled to accept and execute the release on which their termination pay were conditioned. Respondents were aware of these circumstances in detail in the case of several Petitioners based on specific conversations on the subject of their financial obligations between Petitioners and various officers of Champlin. Nagy contemporaneously recorded the fact that he executed his release under economic compulsion, due to the absence of a meaningful choice.

None of the Petitioners had any role in drafting the releases nor was any negotiation permitted over the terms of the release. Petitioners were not represented by an attorney at the time they signed their releases and did not negotiate the terms of the releases.

The Proceedings and Decision in the District Court

Pursuant to the district court's federal question jurisdiction under 28 U.S.C. § 1331, Petitioners filed their complaint in the district court alleging a violation of the ADEA on three grounds.

Petitioners Wamsley, Nagy and Whittenberg in particular, first alleged that certain employees of Champlin terminated at the same time as they were, but over 50, were favored on the basis of age by entitlement to special retired employees' health benefits, special retirement benefits and a special lump sum payment. Petitioners further alleged discrimination on the basis of age by comparison to a second class of employees, substantially all under 40, who were afforded automatic vesting in the Champlin pension plan even if such vesting was not otherwise required. Petitioners finally alleged a violation of the ADEA on the ground that a number of employees of Champlin under 40, with lesser compensation, were offered continuing comparable positions with Citgo while they were not offered such positions or even permitted to continue their employment for the brief time necessary to qualify for the special benefits available to those over 50 and with 10 years of service. Sanderson was specifically told she would not be offered a continuing position because her salary was too high.

Respondents filed a motion to dismiss Petitioners' complaint which was subsequently supported by affidavits and was treated by the district court as a summary judgment motion. Dismissal was sought on the ground that the releases obtained by Champlin precluded the ADEA claims of the Petitioners.

Petitioners contended that the releases Champlin obtained from them were in violation of the governing provisions of the ADEA, as amended by the OWBPA. The claim of a violation was based on the failure of Champlin to afford the period for Petitioners to consider the releases required under § 626(f)(1)(F)(ii), as well as the contention that § 626(f)(1) was violated because the releases were not knowing and voluntary as a general matter, as required by the first sentence of § 626(f)(1). By virtue of § 626(f)(3), Respondents had the burden of proof to establish both compliance with the specific requirement of § 626(f)(1)(F)(ii) as well as the general requirement of § 626(f)(1) that the releases be knowing and voluntary. Accordingly, Petitioners asserted that disputed issues of fact pertinent to compliance with §626(f)(1) and §626(f)(1)(F)(ii) prevented summary judgment in favor of Respondents.

Respondents contended that even if obtained in violation of the OWBPA, the releases should nevertheless be enforced because of the Petitioners' receipt of termination payments in connection with the release and their failure to return, or tender a return, of such termination payments. Respondents' position in that regard was based on the state common law doctrine of ratification. Respondents argued, in the alternative, that even if the doctrine of ratification was not applicable, the termination payments received by Petitioners should be ordered paid into court as a condition to prosecution of their action.

The district court entered a Memorandum Order in favor of Respondents on August 14, 1992.

In the Memorandum Order, the district court granted dismissal. Notwithstanding the controverted facts as to compliance with §626(f)(1)(F)(ii), it held that the forty-five day notice requirement of §626(f)(1)(F)(ii) was not violated. Based solely on such holding -- without any discussion of the alleged fact issue concerning compliance with the separate, general "voluntary and

knowing" requirement of §626(f)(1) -- the district court then held that the releases were "knowing and voluntary within the meaning of Section 626." It noted that Petitioners claimed, even if the releases were otherwise valid, that they were obtained under economic duress and were therefore unenforceable. It also acknowledged the existence of a sharp factual dispute on the issue of duress. However, it did not address the issue, raised by the claim of duress, of Champlin's inability to meet its burden of proof to establish compliance with the general requirement of §626(f)(1) that a release be "knowing and voluntary". Instead, it simply avoided the §626(f)(1) issue, by reference to the doctrine of ratification, based on Petitioners' receipt of termination payments. It relied in doing so on Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991) and Widener v. ARCO Oil and Gas Company, 717 F.Supp.212 (N.D.Tex.1989). Grillet held, as to pre-OWBPA releases, that when an employee agrees to release an employer from liability under the ADEA and receives some consideration for the agreement, the employee ratifies the agreement by retaining the consideration after learning that the release is voidable. Notwithstanding the enactment of §626(f)(1) and its various procedural and substantive requirements for obtaining a valid release of an ADEA claim, including §626(f)(1)(F)(ii), after Grillet, and without reference to the OWBPA, the district court held that in light of the failure of Respondents to return their termination payments, "[t]his case is controlled by Grillet". The district court accordingly entered a take nothing judgment against Petitioners.

The Court of Appeals' Decision

On September 1, 1992, Petitioners appealed the judgment of the district court to the court of appeals. The court of appeals entered an opinion affirming the judgment on December 30, 1993.

In its opinion, the court of appeals affirmed the use of the state common law doctrine of ratification to bar Petitioners' ADEA claims.

The court of appeals acknowledged the disputed issue of fact as to whether Champlin had complied with "the requirement of § 626(f)(1)(F)(ii) that employers must afford their employees the right to consider for 45 days whether they should waive any rights or claims vis-a-vis the ADEA in exchange for benefits under a group termination program." Accordingly, it admitted that the issue could not be resolved by the court through summary judgment and that it could not therefore conclude that Petitioners' releases were "knowing and voluntary" under the OWBPA. Like the district court, it did not address whether the separate issue of economic duress which the district court admitted was disputed prevented summary judgment under §626(f)(1) even without reference to the more specific procedural requirement of §626(f)(1)(F)(ii).

Despite its acknowledgement of an issue of fact under §626(f)(1)(F)(ii), however, the court of appeals concluded, as did the district court, that Petitioners ratified their releases as a matter of law because they had not returned nor offered to return the benefits they received as consideration for the releases. It rejected the argument that the OWBPA effectively overruled Grillet as to post-OWBPA releases. The court of appeals also disagreed that Grillet should be overruled based on Hogue.

In addressing the claim that the OWBPA precluded ratification, the court of appeals rejected the argument that ratification was inconsistent with the plain meaning of the provision in § 626(f)(1) that an individual "may not" waive any ADEA claim unless the waiver is knowing and voluntary within the meaning of § 626(f)(1). Petitioners asserted that the term "may not" should be interpreted to render releases obtained in violation of the OWBPA void and, therefore, unable to be ratified. The court of appeals,

while explicitly recognizing that void, as opposed to voidable, contracts cannot be ratified, concluded that the prohibition on waiver of non-complying waivers in §626(f)(1) does not render void the noncomplying waiver, but rather only makes the waiver voidable so as to be susceptible to ratification.

To support its conclusion, the court of appeals purported to rely on the language and legislative history of the OWBPA. However, it limited its reference to the legislative history to a single statement that the purpose of the waiver provisions in the OWBPA was to "to ensure that an older worker who is asked to sign an ADEA waiver does so in the absence of fraud, duress, coercion, or mistake of material facts. S. REP. No. 101-263, 101st Cong., 2nd Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1537. It reasoned: "The circumstances against which these provisions were designed to protect are the same circumstances that have traditionally given rise to grounds upon which a party can avoid contractual obligations. That the Committee enumerated several of the traditional grounds of avoidance is significant. Also significant is the absence of any language in the statute and any statement in the legislative history indicating that a waiver executed in contravention of the OWBPA requirements is void of legal effect and cannot be ratified by an employee."

The court of appeals' attempt to support its conclusion by reference to other terms of the OWBPA was similarly limited. It cited only one other provision of the OWBPA, § 626(f)(1)(G). That provision stipulates that for seven days after execution of a waiver agreement, an employee may revoke the agreement. According to the panel, "[i]f non-compliance with the other subparts of section 626(f)(1) rendered the agreement void, there would be no need for subpart (G)."

In deference to the context of the ADEA, the court of appeals suggested that holding an illegal waiver void would not be consistent with the purpose of the ADEA "to help employers

and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C.§ 621(b). According to the court of appeals, "[t]he simplest and easiest way to further this purpose is to give effect to private agreements which resolve age related employment problems without the inevitable delays and costs associated with litigation. Were employers forced to assume the risk that non-compliance with all of statutory requirements of section §626(f)(1) renders a waiver agreement for which they have paid valuable consideration void and thus, not capable of being ratified, clearly they would be disinclined to propose such solutions." The court of appeals also suggested the inequity of allowing suit on the basis of a claim of a void waiver since the effect in its view would be to allow against Champlin "continued litigation with opponents who could use, and possibly already have used, to finance their suit, the very funds Champlin paid as consideration to avoid litigation."

Curiously, in view of its reasoning that a release in violation of the OWBPA is voidable, not void, the court of appeals concluded its rejection of Petitioners' argument against ratification by making clear that it was not enforcing any provision of the waiver agreements themselves. Rather, it indicated that it was enforcing only the decision of the Petitioners not to return the consideration for their releases, a decision which it treated as a new promise. It stated:

> Note that the court is not enforcing the promises contained in any of the allegedly voidable waiver agreements as such. What the court is enforcing is a new promise, evidenced by subsequent conduct, to be bound by the terms of the original waiver agreements. Therefore, that the original waiver agreements may not have been in compliance with § 626 is of no consequence. The court is now concerned with the enforcement of a new promise which gives rise to a new

> legal obligation. As a new promise that creates a new obligation, it is not subject to the waiver requirements of §626, and thus, such requirements pose no bar to its enforcement.

11 F.3d at 540.

Based on that distinction, and ignoring the view of at least one its judges that Oberg precluded the doctrine of ratification, it disagreed with the Seventh Circuit's decision in Oberg v. Allied Van Lines, Inc., 11 F.3d 679 (7th Cir. 1993). As it viewed Oberg, "the [Oberg] court concluded, without any analysis of the doctrine of ratification, that no matter how many times parties may try to ratify [a waiver] contract, the language of the OWBPA, '[a]n individual may not waive', forbids any waiver." Id. Compare Campbell v. Sonat Offshore Drilling,, Inc., 979 F. 2d 1115(5th Cir. 1992)(holding Grillet "superseded by statute", citing Oberg).

The court also rejected the alternative argument for overruling Grillet based on Hogue v. Southern R. Co., 88 S.Ct 1150 (1968). It distinguished Hogue, a case under the Federal Employer's Liability Act, 45 U.S.C. §51 et seq. ("FELA"), as involving a special purpose to facilitate recovery and to limit common law defenses to negligence liability in cases of injuries to railroad workers.

By comparison, it claimed that no similar purposes underlie the ADEA because the ADEA created a new cause of action and because, in its words, Congress did not express a "desire to actively facilitate an ADEA claimant's recovery." It criticized the decision of the Seventh Circuit in Oberg to adopt the reasoning of Forbus v. Sears. Roebuck & Co., 958 F.2d 1036 (11 Cir. 1992) and Isaacs v. Caterpillar Inc., 765 F.Supp. 1359 (C.D.Ill. 1991) analogizing the FELA to the ADEA and

concluding that Hogue precludes a "tender back" requirement in suits brought under the ADEA to the same extent as under the FELA.

The court of appeals offered two additional reasons for its position that Hogue was not decisive. First, it suggested a critical distinction between the fact of past bodily injury in the FELA context and the prospective nature of termination of employment in the context of at least those ADEA cases involving a pre-announced reduction in force. Second, it referred to the fact that liability under the FELA is not contested in many instances. From that it reasoned that ADEA plaintiffs, even if not FELA plaintiffs, should have to tender back consideration before suit even if the release they signed was obtained in violation of the OWBPA.

On September 21, 1994, the court of appeals entered an order denying a suggestion for rehearing en banc.

REASONS FOR GRANTING THE PETITION

This case presents an important issue, recurring daily, in the enforcement of the ADEA: the effectiveness of releases of ADEA claims obtained in violation of the ADEA itself.

This is perhaps the most significant legal issue in the administration of the thousands of corporate reductions in force occurring each year. It is central to the relative bargaining power of an employer and its employees in the context of the "take it or leave it" offers inherent in group reductions in force. The waiver provisions of the OWBPA were enacted precisely to provide a counterweight to the inherent superiority of the employer's position and assure a minimum of protection against coercion in connection with an employee's choice to sue, or accept, in connection with the involuntary termination of

employment -- in many cases long term employment -- whatever the employer offers.

The waiver provisions of the OWBPA not only were enacted to protect against coercion, but were also intended to provide definite minimum standards for the enforceability of releases of ADEA claims. In doing so, the OWBPA specifically provided that an employee "may not waive" an ADEA claim if the release or waiver at issue was not "knowing and voluntary," including but not limited to meeting specific minimum requirements of the OWBPA. This degree of regulation of releases, unknown in any other area of federal law, must be interpreted as preemptive of the invocation of the state common law doctrine of ratification as to ADEA claims.

If this Court denies review, it will render merely symbolic, at least in the Fifth Circuit, the plain meaning of the OWBPA and purpose of the OWBPA to prevent releases of ADEA claims from being obtained except under the most informed and voluntary circumstances possible. It will substitute for the certainty of the prohibition of a noncomplying release in the OWBPA the arbitrariness of application of the doctrine of ratification whatever the amount of consideration received and whatever the nature of the underlying violation of the OWBPA or duress, fraud or mistake claimed to make the release less than "knowing and voluntary." Indeed, the results may differ from state to state even within the Fifth Circuit depending on the vagaries of the law of ratification in the particular state where an ADEA claim is pressed.

A denial of review which leaves in effect the court of appeals' decision will thereby remove any disincentive to employers to violate the ADEA in the obtaining of releases. Rather, it will encourage them to violate both the substantive prohibitions of discrimination and retaliation under the ADEA and its waiver provisions, and at the same time, offer minimal

amounts to employees for the release of their consequent ADEA claims, confident that the scheme will be upheld. Moreover, the type of ADEA claim in this case, that the benefits offered to employees in connection with a reduction in force were themselves age discriminatory, although clearly contemplated by the ADEA, would be absolutely precluded.

Accordingly, not only the continuously recurring nature of the issue in this case, but the violence to the terms and purpose of the OWBPA, and the dramatic implications of the rule of the court of appeals for even a pretense of fairness and consistency in the administration of the ADEA, demands review of the court of appeals' decision.

Review is also warranted on the ground that the decision of the court of appeals conflicts directly and absolutely with the decision of the Seventh Circuit in Oberg v. Allied Van Lines, Inc., 11 F. 2d 679 (7th Cir. 1993), which has been followed as to releases governed by the OWBPA by every district court outside the Fifth Circuit addressing the issue both before and since the decision of the court of appeals in this case, and in two instances, by district courts specifically comparing the merits of the Oberg decision and the decision of the court of appeals. If uniformity between the Circuits on this issue is not afforded by review in this case, multi-state employers will have to adopt different rules depending on the residence of employees, employees in one part of the country will be subject to different rules from those in another, and nothing but confusion over the state of the law will exist on an issue as to which Congress obviously sought to provide a measure of certainty. Such deleterious consequences of a failure to grant review will be inimical to both the national community of employers and the millions of older workers affected each year by corporate downsizings.

Finally, review of the court of appeals decision is warranted by the conflict between the decision and this Court's decision in Hogue v. Southern Railway Company, 390 U.S. 516 (1968), rejecting application of the doctrine of ratification in a suit under the FELA.

I. THE QUESTION PRESENTED IN THIS CASE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT

The validity of releases of ADEA claims in the face of a violation of the OWBPA is a necessarily recurring issue which, in the interest of avoiding years of wasteful litigation, this Court should decide now. The decision so plainly conflicts with the terms and purpose of the OWBPA as to call for exercise of this Court's peculiar power to offer national guidance. If this Court exercises that power, it will allow ADEA claims to be released, or alternatively, prosecuted with certainty now lacking as to the effect of an illegal release on the standing of a terminated employee to prosecute suit.

A. The Decision Conflicts with the Terms of the OWBPA

As the court of appeals seemed to concede, even if backhandedly by its emphasis that it was not enforcing any provision of Petitioners' releases, Respondents' violation of § 626 (f)(1)(F)(ii) must render void, not merely voidable, the releases they obtained from the Petitioners.

The conclusion that a release in violation of §626 is void is justified because the OWBPA specifically states that an individual "may not" waive any ADEA claim unless the waiver is knowing and voluntary. Sections 626(f)(1)(A) through (H) state eight specific minimum requirements. Specifically, §626

(f)(1) states that "[a]n individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary." For the purposes of the OWBPA, Congress specifically defined "knowing and voluntary" such that "a waiver may not be considered knowing and voluntary unless at a minimum . . ." the litany of statutory factors (A) through (H) are either satisfied or inapplicable. 29 U.S.C. § 626(f)(1)(A) - (H). In other words, not only does the OWBPA expressly prohibit an individual from waiving an ADEA claim unless knowing and voluntary; it requires an employer to establish compliance with eight minimum standards and, even then, meet the further burden to prove knowledge and voluntariness as a general matter. Thus, if any such release if not knowing and voluntary because it fails to meet the specific requirements of the OWBPA or is otherwise not knowing and voluntary, an employee "may not" waive an ADEA claim pursuant to that release.

The common law doctrine of ratification cannot be invoked in the face of this statutory proscription against releases which are not obtained in a manner consistent with the OWBPA, Otherwise, ratification would make effective what the OWBPA states cannot be effective. As this Court has recently stated:

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'

Connecticut Nat. Bank v. Germain, 112 S. Ct. 1146, 1149 (1992); see also Public Citizen v. Dept. of Justice, 109 S. Ct. 2558 (1988) (Kennedy J., concurring) ("Where the language of a statute is clear in its application, the normal rule is that we are bound by it.").

The legislative background to the OWBPA specifically supports the conclusion that a defense of ratification cannot be used as a subterfuge to avoid a violation of the OWBPA. As noted in O'Shea v. Commercial Credit Corporation, 930 F.2d 358 (4th Cir.1991), the Congress in 1988 through 1990 specifically suspended the effect of an EEOC regulation which allowed "waivers or releases of claims under the [ADEA] without the commission's supervision or approval. Such action makes it clear that Congress did not agree with a policy of allowing waivers to be enforced without the scrutiny of an independent review." In O'Shea, the Court rejected a test of special scrutiny of ADEA releases based merely on the cited Congressional action, stating that the plaintiff "is inviting this Court to accord special significance to acts of Congress which have done no more than leave the law in its nascent state on the issue of unsupervised waivers." However, it is clear beyond dispute that the law after enactment of the OWBPA is no longer "nascent". Accordingly, the OWBPA should be strictly interpreted to make any release not knowing or voluntary within the meaning of the statute void and to preclude a defense of ratification on that ground.

In order to justify its conclusion that the OWBPA does not preclude invocation of the ratification doctrine as to claims under the ADEA made after the enactment of the OWBPA, the court of appeals suggested that the legislative history of the OWBPA failed to evidence an intent to preclude a ratification doctrine. However, the legislative efforts dealing with releases under the ADEA viewed them negatively. While Congress adopted a provision for releases which did not require government supervision, its choice of a less intrusive approach is not to say that it intended releases to be enforceable, through the state common law doctrine of ratification, even if the OWBPA was violated. Indeed, logic dictates that privately enforced and interpreted releases should adhere to higher standards than releases obtained without the intervention of the government.

Further, the OWBPA, while adopting some elements of the "totality of the circumstances" approach used to determine the effectiveness of releases of ADEA claims before the OWBPA, reflected a substantive expansion of the considerations and a stiffening of the requirements necessary to uphold a release. In that regard, while the court of appeals relied on legislative history which refers to common law concepts of "fraud, mistake and duress" as supportive of its position that the ratification doctrine was not precluded, the emphasis in the legislative history on the risks of fraud, mistake, coercion or duress more obviously supports the position of Petitioners that the standard established by the OWBPA was intended to obviate such risks and should be enforced strictly to assure that the intention is served.

B. The Decision Conflicts with the Purpose of the OWBPA

Petitioners' statutory interpretation argument on the ratification issue is plainly warranted by the overriding policy consideration of protecting employees against overreaching represented by the OWBPA.

Moreover, Petitioners' position is not inconsistent with the policy favoring private settlements relied upon by the court of appeals in support of its holding. It must be recognized, however, that the situation faced by parties in the position of Petitioners is not one of voluntary settlements in the usual sense; rather, employees are almost always faced, in a group reduction in force, with a "take it or leave it" offer. The best the OWBPA can do to mitigate the unfairness of this inherent absence of bargaining power on the part of employees is require some minimum degree of disclosure as to the facts which may be pertinent to an age discrimination claim, require the employer to advise employees to seek legal counsel just as the employer will have sought counsel, require the waiver to be in writing and

intelligible, limit the scope of an permissible waiver, and allow a meaningful period of time to the employee to consider the waiver. 29 U.S.C. § 626 (f)(1) (A) - (H). Even so, the OWBPA can never level the playing field; rather, it simply attempts to assure that any employee being asked to waive an ADEA claim does so only after having considered the alternative of suit. Accordingly, requiring employers to follow at least the minimum statutory requirements for a valid waiver is asking only that employers do their part in creating the circumstances in which an informed, or "knowing and voluntary" decision on the part of an employee to forego suit, can be made. That being the case, employers cannot justifiably complain that adherence to the statutory requirements is inconsistent with the policy favoring private settlements invoked by the court of appeals.

By a ruling in Petitioners' favor, employers would not lose the incentive to enter into private settlements, but would have a reinforced incentive to strictly observe the terms of the OWBPA in order to best assure that a settlement which in almost all cases does not even involve the pretense of negotiation or equality of bargaining power has some element of voluntary informed consent.

The contrary conclusion, on the other hand, would leave in place a common law defense asserted by employers prior to the OWBPA which would have the effect of automatically nullifying the OWBPA, in the case of every violation of § 626(f)(1) where consideration of any amount was retained by an employee, despite its substantial regulation of releases and its specific assignment of the ultimate burden of proof of their enforceability on the employer. Specifically, there would be no sense to imposing numerous requirements on ADEA waivers in connection with large group layoff programs, which invariably involve special termination benefits, if receipt of such special benefits was to vitiate those requirements. It is not credible that Congress would have imposed such requirements on releases if

they could be undermined simply by an employee's receipt of special termination benefits, rather than rejection of such benefits, out of fear for his economic subsistence. The illogic can hardly be overstated; aware as it obviously was of the dynamics of large scale reductions in force in particular -- and specifically, the usual offers to make certain limited payments to employees in order to induce them to waive any contest to their termination or benefits -- Congress could hardly have intended to impose the burdens of § 626(f) knowing that would be irrelevant so long as employees accepted the proffered payments, regardless of amount and, under the theory of the court of appeals, even if the amount were token.

Given the perversion of the purpose of the OWBPA by a rule permitting ratification as a defense, review of the court of appeals' decision is necessary to uphold the meaning and purpose of the OWBPA and to avoid the predicament that employees' rights under the ADEA are now unprotected from coercion despite the enactment of the OWBPA.

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF THE SEVENTH CIRCUIT

In regard to both statutory interpretation of the OWBPA and the applicability of the doctrine of ratification to releases governed by the OWBPA, the court of appeals' decision is in direct conflict with the well-reasoned decision of the Seventh Circuit in Oberg v. Allied Van Lines, Inc., 11 F. 2d 679 (7th Cir. 1993), aff'g. Oberg v. Allied Van Lines, Inc., 1992 U.S. Dist. LEXIS 11208, 59 Fair Empl. Prac. Cas. (BNA) 769, 59 Empl. Prac. Dec. (CCH) P41,706, 15 E.B.C. 2163 (Slip Opinion, July 22, 1992, N.D. Ill.); accord, Collins v. Outboard Motor Corporation, 808 F. Supp. 59 (N.D.Ill. 1992); Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993) (rejecting ratification doctrine based on Oberg and Hogue);

Pierce v. Atchison, Topeka & Santa Fe Ry. Co., 1993 U.S. Dist. LEXIS 702 (N.D. Ill. 1993) (same); Blistein v. St. John's College, 1994 U.S. Dist. LEXIS 11637 (D. Md. 1994) (rejecting Wamsley in favor of Oberg); Raczak v. Ameritech Corporation, 1994 U.S. Dist. LEXIS 13076 (E.D. Mich. 1994) (same); cf. EEOC v. Sears, Roebuck & Co., 857 F. Supp. 1233 (N. D. Ill. 1994) (recognizing validity of Oberg, but rejecting the position of the EEOC that conditioning severance benefits on an invalid release is retaliation actionable under ADEA).

In Oberg, Collins, Pierce and Carr, and more recently, since the court of appeals' decision in this case, Blistein and Raczak, the courts held that a defense of ratification, and any related tender-back requirement, is unavailable as to any release governed by the OWBPA.

Oberg held that the defense of ratification or any tender-back requirement cannot be considered in the face of the comprehensive regulation of waivers under §626(f). The Oberg court reached this conclusion based on an extended analysis of pre-OWBPA case law and the changes made by the OWBPA. As in this case, the issue of the applicability of a ratification defense and tender-back requirement was posed on a motion for summary judgment by defendant employer. As in this case, a contention was made that a specific requirement of §626(f)(1) was violated by the employer, and the district court so assumed for purposes of the motion.

The Oberg court first reviewed the cases relied upon by the court of appeals in this case, Grillet and O'Shea. In declining to follow them, however, the Oberg court did not, however, adopt the proffered distinction between void and voidable releases suggested by those decisions, but noted the reliance in those cases on state law ratification doctrines to hold releases enforceable even when challenged as not informed and voluntary under pre-OWBPA standards. With reference to O'Shea, in

particular, it noted that the only pre-OWBPA requirement was that the release be knowing and voluntary, defined differently from Circuit to Circuit. It then noted the extent to which the OWBPA adds significant additional requirements and imposes a heavy burden upon employers, and determined that such additional requirements precluded a ratification or tender-back argument as a matter of federal law, by preemption. Specifically, it stated:

> Had Congress not spoken this court may have even been inclined to follow Grillet and O'Shea, and allow employees the freedom to ratify their severance agreements through general principles of contract law. However, Congress has occupied this area of the law through the enactment of the OWBPA.

11 F. 2d at 683. It then observed that the OWBPA "plainly restricts an employee's freedom to waive his rights or claims under the ADEA," and relying on this Court's decision in Connecticut Nat. Bank v. Germain, 112 S. Ct. 1146, 1149 (1992), stated that "[i]n interpreting the requirements of the OWBPA , we assume that the statute's operative words carry the plain meaning within their context. Under OWBPA, unless a waiver contract takes the form required by the statute, an employer and an employee cannot contract to waive the ADEA provisions." 11 F. 2d at 683.

It indicated its agreement with both Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir.), cert. denied, 121 L. Ed. 2d 336, 113 S. Ct. 412 (1992) and Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359 (C.D. Ill. 1991), both of which "rejected the legal possibility of an invalid ADEA waiver ever becoming subsequently ratified, even if the employee were to continue accepting the agreement's benefits." Id. It stated: "No matter how many times parties may try to ratify such a contract, the language of the OWBPA, "an individual may not waive", forbids

any waiver." 11 F. 3d at 683.

The Oberg court's conclusion thus affirmed the even more extended analysis of the issue by the district court in Oberg. The district court, while not specifically adopting either the terminology of preemption or that of federal common law, held that "a general tender requirement would interface with both the Act's specific requirements and its general purpose concerning waivers of ADEA liability." 1992 U.S. Dist. LEXIS 11208, at 10. The district court quoted from the legislative history to the OWBPA, emphasizing the particular considerations of fairness arising in group termination or reductions such as that in which Petitioners were forced to participate, and the resulting need for special requirements. Specifically, it noted:

> Congress included these additional informational requirements because it found that "group termination and reduction programs raise additional issues and require additional protection for individuals from whom a waiver is sought." 1990 U.S.C.C.A.N. at 1539. As the Senate Committee report explains,
>
> > the Committee believes that collectively these informational requirements will permit older workers to make more informed decisions in group termination and exit incentive programs. The principal difficulty encountered by older workers in these circumstances is the inability to determine whether the program gives rise to valid claim under the ADEA. In many circumstances, an older worker will have no information at all regarding the scope of the program or its eligibility criteria. The informational requirements set forth in the bill are designed to give all eligible employees a better picture of these factors.

> Id. at 1539. That report also makes clear that these informational requirements are meant to protect workers: "The special protection accorded with respect to exit incentive and group termination programs presuppose that affected individuals are not 'on guard' to protect their rights."

1992 U.S. Dist. LEXIS 11208, at 13-14.

In light of such legislative history, the district court had no difficulty rejecting the employer's defense of ratification:

> In the case before us, Allied apparently employed a group termination plan yet failed to provide Oberg, Tautz, and Adams the information required pursuant to the newly amended section 626(f). In failing to do so, Allied ignored a crucial portion of the statute and flouted Congress' clear command that employees by providing this information. Allied now asks us to enforce these defective releases on the theory -- based entirely in common law contract notions -- that the Plaintiffs ratified their releases retaining the special severance benefits provided them as consideration for execution of the defective releases.
>
> We believe that enforcing these releases pursuant to a tender-ratification theory in this case would circumvent both the language and purpose of the OWBPA. That Act clearly states "[a]n individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." In order to find that the Plaintiffs ratified their defective releases, we would need to conclude that an individual may waive her ADEA rights by ratifying a waiver that was not knowing and voluntary when signed because it did not fulfill the Act's specific requirements. A waiver by this method is not

provided for by the language of the Act and was not contemplated by Congress.

As Judge Mihm explained in Isaacs, finding a tender requirement after the passage of the OWBPA would as a practical matter undo that Act's waiver provisions, 765 F.Supp. at 1367. He explained, "No matter how egregiously releases might violate the requirements of the Older Workers Benefit Protection Act, employees would be precluded from challenging them unless they somehow could come up with the money they were given." Id. We agree that a tender requirement would interfere with the Act's purpose and operation. Moreover, we believe that a tender requirement would encourage employers to ignore the specific provisions of the Act in hopes that by the time their former employees discovery that the releases that they signed are voidable, they will be in no economic position to tender back or refuse to accept the special severance benefits accorded them.

Prior to the enactment of the OWBPA, a release that was not knowing and voluntary when initially executed might have become enforceable through ratification if the employee both gained the knowledge withheld from her at the time of the signing and then voluntarily retained the benefits of her bargain. This reasoning certainly undergirds Grillet and O'Shea.

We find that the OWBPA's strict requirements for a knowing and voluntary waiver preclude waiver by ratification.

Id. at 14-17. (Emphasis added).

The district court in Oberg also responded to the argument made by the court of appeals here that the Petitioners' position would lead to an unfair result or even a windfall.

> Allied complains that it has lost the benefit of its bargain, that it is unfair to permit the Plaintiffs to retain the special consideration that they received for executing the releases and then "double dip" by filing an ADEA lawsuit. We view the bargain differently. Allied had an opportunity to present its employees with a written waiver that met all OWBPA requirements. Had it done so, the facts and the result in this case would be different; certain employees might have decided not to sign the release and thus have forgone the special severance benefits, opting instead to gamble on a lawsuit. For those who did sign, however, Allied would have had a valid and enforceable release. In essence, Allied got what it bargained for -- a faulty release for special severance benefits. It bears repeating that Allied had almost complete control over drafting of the Separation Agreement that it offered its employees. Further, the Plaintiffs will not enjoy a double dip. Funds paid by Allied for the defective releases will be a set off against any damages recovered by the Plaintiffs.

Id. at 19-20.

As also noted in the district court decision in Oberg, § 626(f) represented a dramatic from the federal common law guidelines applied in the Fifth Circuit prior to enactment of the OWBPA. As also emphasized in Oberg, the provisions of § 626(f) enacted under OWBPA were not limited to the pre-OWBPA test of the validity of releases, in the Fifth Circuit or any other Circuit, but contained substantial new protections for employees. Accordingly, there is no doubt that fraud, mistake or duress are not the only defenses to a release at this time; both

the additional statutory protections and the other factors which were to be considered in the Fifth Circuit under O'Hare v. Global Natural Resources, Inc., 898 F.2d 1015 (5th Cir. 1990) prior to the OWBPA now determine the validity of releases. Moreover, since the Congressional purpose in enacting § 626(f) of the OWBPA was "concern over unsupervised releases", the Oberg court was correct in its conclusion that the concern would be better served by not rewarding employers for violating the statute.

Accordingly, the decision of the court of appeals is wrong as a matter of statutory interpretation and the federal law of preemption. Oberg correctly held that invocation of the state common law doctrine of ratification is precluded because §626 (f), clearly makes enforceability of ADEA releases a matter exclusively of federal law.

This Court should accordingly grant review and uphold Oberg and reverse the decision of the court of appeals.

III. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT

The opinion of the court of appeals also merits review on the ground that it is inconsistent with the decision of this court in Hogue v Southern Railway Company, 390 U.S. 516 (1968). In fact, both of the Oberg courts noted two pre-OWBPA cases in which courts determined a defense of ratification or any tender-back requirement to be precluded even prior to the OWBPA by reliance on Hogue. Isaacs v. Caterpillar, Inc., 765 F.Supp. 1359 (E.D.Ill.1991); Forbus v Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992). The Seventh Circuit indicated that they were correctly decided, stating:

> Noting the factual similarities between Forbus and Isaacs, and this case, we are convinced that the reasoning behind Forbus and Isaacs, analogizing the policy of ADEA to that of FELA, and thus applying Hogue, is correct. Therefore, we hold that Plaintiffs were not required to tender back their severance benefits before filing their ADEA claims, notwithstanding Plaintiffs' previously executed waiver of all claims against Allied.

11 F.3d at 684. As it noted, this Court in Hogue

> rejected any notion that state common law principles could help resolve the tender back question in FELA cases [but rather, stated] that "the question whether a tender back of the consideration was a prerequisite to the bringing of the suit is to be determined by federal rather than state law."

Id.

The district court opinion affirmed by the Seventh Circuit again reinforced the soundness of its reasoning. As the district court observed::

> The Isaacs court reasoned that "both the FELA and the ADEA are remedial statues intended to protect employees" and thus a tender requirement should no more be a prerequisite in the ADEA context than in the FELA context. 765 F.Supp at 1366-67. The court concluded that the tender requirement would interfere with the remedial purposes of ADEA, because it "will likely make it impossible for employees to challenge ADEA releases -- a result Congress plainly does not want. (Emphasis added.)

1992 U.S. Dist. LEXIS 11208, at 13-14. The district court noted the similar reliance of the Forbus court on Hogue:

> This court in Hogue found that a tender-back requirement would deter meritorious challenges to releases in FELA lawsuits. The same deterrence factor applies to ADEA claims. For older employees to tender back their severance benefits in order to attempt the regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress. Such a rule would, in our opinion, encourage egregious behavior on the part of employers ... The ADEA was specifically designed to prevent such conduct, and we reject a tender requirement as a prerequisite to institutions a challenge to a release in an ADEA case.

Id..

The court of appeals in this case nevertheless rejected Petitioners' suggestion that Grillet be reconsidered both as to post-OWBPA and pre-OWBPA cases based on Hogue. Based on two claimed distinctions between the ADEA and FELA, it disagreed with the conclusion of Forbus and Isaacs that the ratification doctrine is as inconsistent with the ADEA as with the FELA.

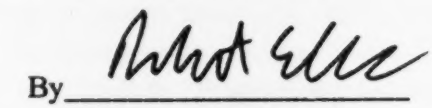
The alleged distinctions offered by the court of appeals were not colorable. The first, that the FELA has a more remedial purpose than the ADEA in terms of its derogation from common law, is plainly wrong, given the absence at common law of a cause of action for age discrimination and the numerous requirements of the waiver provisions of the OWBPA granting substantially more protection to releasors than the common law of releases. The second distinction, based on the past nature of a bodily injury addressed by the FELA, as opposed to the future

character of an impending reduction in force, is equally specious because it does not address the most typical ADEA fact pattern, involving a selective individual termination as an accomplished fact. Moreover, in either case, the distinction is insulting to the worker whose loss of a job is no less an injury than a personal injury covered by the FELA, whether it has just occurred or is a few weeks off. Even apart from the invalidity of the distinctions offered by the court of appeals, however, they are insufficient. As applied in Hogue, the FELA, like the ADEA, requires that a release be knowing and voluntary, but unlike the OWBPA, does not also specify by its terms that an employee may not waive a claim unless that requirement is met. Accordingly, the distinction between the FELA and the ADEA arguably cuts in favor of a more liberal rule under the ADEA. Hogue therefore even more clearly dictates the same conclusion in this case.

CONCLUSION

For reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

By 

Robert E. Goodman, Jr.
State Bar. No. 08158100
5956 Sherry Lane
Suite 800
Dallas, Texas 75225-8030
(214) 368-1765
(214) 368-3974 (telecopy)

COUNSEL FOR PETITIONERS

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-1743

ALLEN M. WAMSLEY, DONALD J. WHITTENBERG, ANTHONY J. NAGY, BETTY R. SANDERSON and GLENDA K. BENNETT,

Plaintiffs-Appellants,

VS.

CHAMPLIN REFINING AND CHEMICALS, INC., ET AL.,

Defendants-Appellees.

Before JONES and DeMOSS, Circuit Judges, and BARBOUR, District Judge[1]

DeMOSS, Circuit Judge:

We are called upon in this case to determine whether the waiver requirements of the Older Workers Benefit Protection Act[2]

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[1] Chief Judge from the Southern District of Mississippi, sitting by designation.

[2] Pub. L. No. 101-433, S 201, 104 Stat. 983 (1990) (amending the Age Discrimination in Employment Act at 29

(the "OWBPA"), make our holding in Grillet v. Sears Roebuck & Co., 927 F.2d 217 (5th Cir. 1991), unsound. Because we conclude that nothing in the text or the legislative history of the OWBPA evidences a congressional intent to disturb the common law principles to which our holding in Grillet is anchored, the district court's judgment is affirmed.

BACKGROUND

Appellants are former employees of Champlin Refining & Chemicals, Incorporated ("Champlin") or one of its predecessors-in-interest. In September of 1990, Champlin informed its Irving, Texas office employees that at the end of the year Champlin would become a wholly owned subsidiary of Citgo Petroleum Corporation. Champlin explained that as a result, the Irving office was to be closed and several of its employees were going to lose their jobs. Champlin also explained that it was initiating a "Termination Pay Plan" (the "Plan") for the benefit of those employees whose employment would be terminated. In October, Champlin circulated a copy of the Plan to all of its employees, including Appellants.

In November and December, Champlin informed Appellants that they were among the employees who were going to be "let go." Champlin provided them with a "Notice Pertaining to Release of Claims" document and a "Release of Claims" agreement.[3] The notice included the following provision:

U.S.C.A. 626(f) (West Supp. 1993)).

Although you may execute the Release of Claims as soon as you wish, you also may take up to 45 days from your receipt of the Release of Claims to consider it. Your decision to execute the Release of Claims and accept benefits under the Termination Pay Plan will be revocable for seven days after execution, and no payment of termination pay will be made until that period has expired.

Therefore, to be able to provide your termination pay to you not later than five business days after the termination of your employment, the Company must receive your executed Release of Claims at least seven days before that payment date.

On November 7, Wamsley received the notice and release and was informed that he would be terminated on November 30; on November 15, Nagy received the notice and release and was told that his termination date was also on the 30th; on November 20, Whittenberg, Bennett, and Sanderson received the notice and release and were informed that their employment would be terminated on December 31.

The release provided for Appellants' waiver of any action or claim against Champlin and "its successors, assigns, [and] affiliates," "relating to or arising out of [their] employment or the termination of such employment, with [Champlin] including but not limited to, claims for under . . . the Age Discrimination in Employment Act of 1967." The release made clear that the benefits to be paid under the Plan constituted the consideration for the release.

Each of the appellants executed a release, and in return, Champlin paid Appellants severance benefits.[4] It is undisputed that Appellants would not have otherwise been entitled to receive these benefits; such benefits were paid strictly as consideration for their release of Champlin.

In April of 1991, Wamsley, Whittenberg, Nagy, and Sanderson sent Champlin a letter threatening suit under the ADEA.[5]

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[4] Wamsley executed on November 20 and received $84,369.13; Nagy executed on November 21 and received $90,763.01; Sanderson executed on November 27 and received $25,634.99; Bennett executed on December 19 and received $28,442.80; and Whittenberg executed on December 21 and received $54,000.00. In addition to cash, appellants received other benefits including outplacement services through 1991 and medical, dental and life insurance benefits for a period of six months.

[5] Apparently Bennett had not thrown in with the other would-be-litigants at this time.

Later that year, in May, each of the aforementioned appellants filed charges against Champlin for age discrimination with the Equal Employment Opportunity Commission.[6] In January of 1992, their releases notwithstanding, Appellants filed suit against Champlin, Citgo and the Plan (collectively referred to as "Champlin") alleging that it had unlawfully discriminated against them on the basis of age when it terminated their employment and denied them certain benefits under the Plan.

They also alleged that their releases were "void or voidable due to duress and Champlin's failure to comply with one of the conditions of the OWBPA. Appellants contended that Champlin had failed to provide them 45 days to consider the release as required under the OWBPA, and thus, the releases were not "knowing and voluntary" within the meaning of the section 626(f)(1) of the ADEA.

Champlin answered the suit with a motion to dismiss. It argued that the releases were valid under the OWBPA and relied on the above-quoted portion of the notice document as proof that Champlin had provided its employees the 45-day consideration period. It also tendered affidavits specifically denying that Appellants were told to execute and return the release prior to the expiration of the 45-day period. Champlin explained that it had simply told its employees that they could avoid an interruption in payroll if they returned the executed releases before their termination date.

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[6] Bennett filed her claim with the EEOC on December 30, 1991.

Champlin also averred that Appellants had not returned or offered to return the severance benefits they received as consideration for the releases. Thus, Champlin argued that even if the court was unable to determine as a matter of law that Champlin had provided the 45-day consideration period, the court should hold that Appellants had ratified the releases and dismiss their claims.

Appellants responded to Champlin's motion and proof by tendering affidavits in which each swore to facts surrounding their termination and execution of the release. Appellants claimed to have been told by certain individuals in the Champlin organization that they had to sign and return the release by their termination date, less than 45 days after receiving the notice, in order to receive benefits under the Plan.

On August 14, 1992, the district court granted Champlin judgment and dismissed Appellants' suit. The court held that the releases were knowing and voluntary within the meaning of the ADEA and, thus, barred Appellants' suit. The court alternatively held that even if the releases were not valid when executed, Appellants had ratified the agreements by failing to return to Champlin the benefits they had received as consideration after learning of the releases' alleged invalidity.

Appellants appeal, raising two general contentions. They argue first, that fact issues exist regarding the knowing and voluntary nature of their releases. They also contend that the doctrine of ratification has no application in this suit. Although we agree with Appellants' first contention, we reject their second. The district court's judgment is, therefore, affirmed.

DISCUSSION

Knowing and Voluntary Waiver

Congress, through enactment of the OWBPA, has determined that employers must afford their employees the right to consider for 45 days whether they should waive any rights or claims vis - vis the ADEA in exchange for benefits under a group termination program. 29 U.S.C. § 626(f)(1)(F)(ii). Appellants contend, inter alia, that Champlin denied them this right. Champlin responds by arguing that it complied with the 45-day requirement and pointing to the "Notice Pertaining to Release of Claims" document as proof. Appellants counter by swearing that the information contained therein was orally countermanded by certain persons at Champlin. Champlin, of course, denies that Appellants were told anything of the sort.

Which version accurately describes Champlin's dealings with Appellants is an issue that cannot be resolved by the court through summary judgment. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 249-55 (1986). We are unable to conclude, therefore, that Appellants' releases were "knowing and voluntary" under the OWBPA. Although we recognize that Appellants have managed to create a fact issue on this point, we consider the issue to be immaterial in light of our conclusion that Appellants have ratified their releases as a matter of law.

Ratification of the Releases

Appellants do not dispute that they have neither returned nor offered to return the benefits they received as consideration for the releases. Rather, Appellants argue that the law does not require them to make such a tender in order to pursue claims under the ADEA. In taking this position, Appellants press two arguments. They first contend that the OWBPA has effectively overruled our decision in Grillet v. Sears Roebuck & Company. In Grillet, the

court held that when an employee agrees to release her employer from liability under the ADEA and receives benefits as consideration for the agreement, the employee ratifies the agreement if she retains the consideration after learning that the release is voidable. 927 F.2d at 220. Appellants alternatively argue that Grillet was erroneously decided and should be overruled. We treat each argument in turn.

The OWBPA and Ratification

Appellants contend that "[t]he language and purpose of the OWBPA preclude ratification of a release otherwise in violation of the OWBPA." The language upon which Appellants rely states that an individual "may not" waive any ADEA claim unless the waiver is knowing and voluntary within the meaning of section 626(f)(1) of title 29. (emphasis Appellants') Appellants read this language to mean that any waiver failing to meet one of the requirements under section 626(f)(1) is not simply voidable, but void and, therefore, unable to be ratified.

The doctrine of contractual ratification is the enforcement of a promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not avoided prior to the making of the promise. RESTATEMENT (SECOND) OF CONTRACTS § 85 (1981). To have ratification, there must be an antecedent contract that was previously voidable, but not avoided. A contract is voidable if there exist grounds upon which a party can avoid, or disaffirm, his duty of performance. Id. § 7. Such grounds have traditionally included fraud, duress, mistake and infancy. Id. § 7 cmt. b.

Ratification operates to allow a party having the power to avoid his contractual duty to make, or be deemed to have made, a new promise to perform his previously voidable duty and thus,

extinguish his power of avoidance. Id. § 85 cmt. a. To say that a contract is voidable, therefore, is to say that an antecedent promise created a legal duty on the promisor's part and that the promisor has the power either to avoid performance, based on any one of the several grounds of avoidance, or to ratify the promise by making a new one.[7]

Promises that are void cannot be ratified. The reason for this is simple: Void promises are not legally binding and thus, are not contracts. Id. § 7 cmt. a. Without an antecedent contract to ratify, there can be no ratification. To say that a promise is void is to say that it created no legal obligation and that the promisor is without the power to bind himself under a new promise to perform the antecedent promise. Id. 8 and 85 cmt. a.

We do not interpret the language of section 626(f)(1) to mean that a waiver which fails to meet the requirements of subsections (A) through (H) is void of legal effect. Rather, we interpret it to mean that such waivers are not knowing and voluntary and thus are subject to being avoided at the election of the employee. This interpretation comports with the language of

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[7] Note that if the same grounds for avoidance exist when the new promise is made, the party again enjoys the power to avoid performance under the new promise. REST. CONT., S 85 cmt. b. Where, however, such grounds no longer exist, ratification mandates performance of the new promise.

section 626(f)(1) and is supported by the legislative history of the OWBPA.[8]

We also find that the provisions of section 626(f)(1) support our conclusion that defective waiver agreements are voidable and not void. Section 626(f)(1)(G) expressly provides that for seven days after execution of a waiver agreement an employee may revoke the agreement and that the agreement does not become enforceable until the expiration of the seven day revocation period. If non-compliance with the other subparts of section 626(f)(1) rendered the agreement void, there would be no need for subpart (G).

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[8] The legislative history indicates that the fundamental purpose of the OWBPA waiver provisions is to ensure that an older worker who is asked to sign an ADEA waiver does so in the absence of fraud, duress, coercion, or mistake of material facts. S. REP. No. 101-263, 101st Cong., 2nd Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1537. The circumstances against which these provisions were designed to protect are the same circumstances that have traditionally given rise to grounds upon which a party can avoid contractual obligations. That the Committee enumerated several of the traditional grounds of avoidance is significant. Also significant is the absence of any language in the statute and any statement in the legislative history indicating that a waiver executed in contravention of the OWBPA requirements is void of legal effect and cannot be ratified by an employee.

Finally, an interpretation of section 626(f)(1) that renders defective waiver agreements void would be inconsistent with one of the expressed purposes of the ADEA: "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The simplest and easiest way to further this purpose is to give effect to private agreements which resolve age related employment problems without the inevitable delays and costs associated with litigation. Were employers forced to assume the risk that non-compliance with all of statutory requirements of section 626(f)(1) renders a waiver agreement for which they have paid valuable consideration void and thus, not capable of being ratified, clearly they would be disinclined to propose such solutions.[9]

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[9] The facts before us testify to this truth. The Plan which Champlin circulated to Appellants in early October 1990 contained a provision materially identical to the waiver agreement that each of the appellants executed. Thus, two of the appellants had almost two months and the others had almost three months to consider the Plan and their waiver of rights under the ADEA. Nevertheless, after executing the agreements and accepting the termination benefits as the consideration for their promises not to sue, each of the appellants filed suit, claiming that the waiver agreements were not "knowing and voluntary." Although, Champlin's documentary evidence shows it to have been in letter perfect compliance with section 626(f)(1) and to have lived up to its end of the waiver bargain, the nature of Appellants' attack on the agreements assured Appellants of a fact issue with

Therefore, we hold that neither the language nor the purpose of the OWBPA indicates a congressional desire to deprive an employee of the ability to ratify a waiver that fails to meet the requirements of the OWBPA. When Appellants chose to retain and not tender back to Champlin the benefits paid them in consideration for their promise not to sue Champlin, they manifested their intention to be bound by the waivers and thus, made a new promise to abide by their terms.[10] Grillet, 927 F.2d at 220; O'Shea v.

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which to avoid summary judgment on this issue. Thus, were we to conclude that Appellants' waiver agreements were void from their execution, Champlin would be facing continued litigation with opponents who could use, and possibly already have used, to finance their suit, the very funds Champlin paid as consideration to avoid litigation.

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A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. REST. CONT. § 2. That a promise has been made can be determined from conduct as well as words. REST. CONT.§19. Here the conduct giving rise to Appellants' promise to perform under their waivers was their retention of the consideration for their waivers. That Appellants may have subjectively intended something different is of no moment.

In the final analysis, the objective

Commercial Credit Corp., 930 F.2d 358, 362 (4th Cir. 1991); In Re Boston Shipyard Corp., 886 F.2d 451, 455 (1st Cir. 1989); Anselmo v. Manufacturers Life Ins. Co., 771 F.2d 417, 420 (8th Cir. 1985). The court will enforce their new conduct based promises as it legally and equitably should.[11]

> from the subjective theory, is based on analogy to estoppel. This is apparent whenever a person is held bound by a contract because of his manifestations when his manifestations are contrary to his actual state of mind.

1 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 98, P . 362 (1957) (footnote omitted).

[11] Note that the court is not enforcing the promises contained in any of the allegedly voidable waiver agreements as such. What the court is enforcing is a new promise, evidenced by subsequent conduct, to be bound by the terms of the original waiver agreements. Therefore, that the original waiver agreements may not have been in compliance with § 626 is of no consequence. The court is now concerned with the enforcement of a new promise which gives rise to a new legal obligation. As a new promise that creates a new obligation, it is not subject to the waiver requirements of 626, and thus, such requirements pose no bar to its enforcement. Consequently, we find

Grillet and Hogue

Appellants alternatively argue that our decision in Grillet is contrary to the Supreme Court's decision in Hogue v. Southern R. Co., 88 S.Ct 1150 (1968). We disagree.

In Hogue, the Court held that a "tender back" of consideration paid by a rail carrier to one of its injured employees in exchange for the employee's release was not a prerequisite to the employee bringing suit on the injury. Id. at 1151-5. The Court reasoned as follows:

> [A] rule which required a refund as a prerequisite to institution of suit would be wholly incongruous with the general policy of the [Federal Employers

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no bar to its enforcement. Consequently, we find ourselves in respectful disagreement with the Seventh Circuit's recent decision in Oberg v. Allied Van Lines, Inc., 1993 WL 483614 (7th Cir. Nov. 23 1993), in which the court concludes, without any analysis of the doctrine of ratification, that n tn]o matter how many times parties may try to ratify [a waiver] contract, the language of the OWBPA, '[a]n individual may not waiver', [sic] forbids any waiver." Id. * 3. We believe that the court's conclusion in Oberg is at odds with the legislative history and congressional intent behind the OWBPA, See Note 8, supra, and overlooks the legal theories that define the doctrine of ratification of voidable contracts.

> [A] rule which required a refund as a prerequisite to institution of suit would be wholly incongruous with the general policy of the [Federal Employers Liability Act] to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers. Rather it is more consistent with the objectives of the Act to hold, as we do, that it suffices that, except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due to the injured employee.

Id. at 1152 (citations omitted). The Court's holding is founded on the recognition that a "tender back" requirement would be "wholly incongruous" with the right of recovery provided under the FELA and inconsistent with the objectives of that Act. The right of recovery under the FELA, however, is unique in that it advances a congressional intention of facilitating recovery by injured railroad workers against their employers.

The FELA was designed not simply to discourage negligent conduct, for indeed, the common law at the FELA's passage provided rail workers an action for negligence. Rather, the Act was rail workers an action for negligence. designed with a broader purpose in mind: "To provide liberal recovery for injured workers," Rernan v. American Dredging Co., 355 U.S. 426, 432 (1957), and thus, "to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."[12] Wilkerson v. McCarthy, 330 U.S.

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12 The FELA's legislative history testifies to this truth:

[T]he employers' liability law . . . places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling. The total casualties to trainmen on the interstate railroads of the United States for the year 1908 was 281,645.

It was the intention of Congress in the enactment of this law . . . to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can, as the Supreme Court said in the Taylor case (210 U.S. 281), "measurably control their causes.

The passage of the original act and the perfection thereof by the amendments herein proposed stand forth as a declaration of public policy to radically change, as far as congressional power can extend, those rules of the common law which the President, in a recent speech at Chicago, September 16, 1909,

53, 68 (1949) (concurring opinion of Justice Douglas). It accomplished these purposes by creating a statutory scheme that "stripped [an employer] of his common law defenses," and granted recovery if the "employer['s] negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506-7 (1956). These dramatic changes evinced a clear congressional intent "favoring unburdened and expeditious recoveries" by rail

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> characterized as "unjust." President Taft in his address . . . referred "to the continuance of unjust rules of law exempting employers from liability for accidents to laborers."
>
> This public policy which we now declare is based upon the failure of the common-law rules as to liability for accident, to meet the modern industrial conditions and is based not alone upon the failure of those rules in the United States, but their failure in other countries as well.

GRIFFITH, THE VINDICATION OF A NATIONAL POLICY UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, 18 LAW & CONTEMP. PROB. 160 (1953) (quoting from 45 Cong. Rec. 4041 (lgl0)).

workers. Smith v. Pinell, 597 F.2d 994, 996 (5th Cir. 1979).

The FELA's statutory scheme removed several of the common-law obstacles hindering the injured rail worker's "unburdened and expeditious recovery." The Supreme Court in Hogue removed yet another common-law obstacle to the rail worker's congressionally encouraged recovery. By so acting, the Court advanced the FELA's purposes of providing liberal recovery to injured rail workers and thus, of shifting from them to their employers the heavy loss associated with their severe injuries.

No such purposes underlie the ADEA. Congress expressly declared that the purposes of the ADEA were "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). Unjustified discrimination on the basis of age was the problem targeted by the ADEA. To redress this problem, Congress provided employees a wholly new right of action for age discrimination. Nowhere in section 621(b) did Congress express, however, its desire to actively facilitate an ADEA claimant's recovery .[13]

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[13] We believe that the Seventh Circuit in Oberg, by adopting the reasoning of Forbus v. Sears. Roebuck & Co., 958 F.2d 1036 (11 Cir. 1992), and Isaacs v. Caterpillar Inc., 765 F.Supp. 1359 (C.D.Ill. 1991), has improperly analogized the FELA to the ADEA and, thus, arrived at the erroneous conclusion that Hogue precludes a "tender back" requirement in suits brought under the ADEA. For the reasons set forth in this opinion, we consider these two "remedial" statutes to

What Congress did under the FELA was something it has not yet done under the ADEA, that is, to legislatively facilitate an employee/claimant's recovery. Until Congress demonstrates its desire to promote "liberal," "unburdened and expeditious recoveries" to claimants under the ADEA, Grillet will remain sound authority and unaffected by Hogue.

We also note that there are fundamental differences between settling a claim for personal injury or death under the FELA and settling a potential claim for a possible ADEA violation in connection with an employer's pre-announced program for reduction in force. In the FELA situation the injury has in fact already occurred; otherwise there is no FELA claim to settle. However, in an ADEA situation dealing with a prospective reduction in force, such as involved here, the purpose of the settlement agreement is to compromise in advance a potential age discrimination event and to offset in advance any loss and injury which an employee might experience if such an event were to occur.

Moreover, the FELA has effectively rendered liability of the employer a given in the great majority of cases, leaving quantification of damages as the principal focus of settlement negotiations. No such inference of liability exists as to ADEA claims; mere termination of employment is not sufficient to establish liability. An ADEA claimant faces the burdensome task

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be fundamentally different in congressional purpose and intent. Consequently, we consider such an analogy inaccurate.

of proving that the termination of his employment was the result of unlawful age discrimination. Therefore, the elements to be considered in the settlement of an ADEA claim involve not only damages, but also the more critical issue of threshold liability. Therefore, when (1) an employer presents his employee with a settlement agreement, the purpose of which is to resolve the issues of potential liability and damages under the ADEA, (2) the employee is given the opportunity to consider the agreement for a period of almost two months, and (3) the employer funds the agreed settlement consideration, thus performing its side of the bargain - all of which has occurred in this case, we believe justice and equity require the employee who seeks to avoid the obligations to which he agreed under the settlement agreement to return the consideration which he received for his promise not to sue.

CONCLUSION

In light of the foregoing, we AFFIRM the district court's judgment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ALLEN M. WAMSLEY, ET AL.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
CHAMPLIN REFINING & CHEMICALS, INC., ET AL.,	§	3:92-CV-0078-G
Defendants.	§	

MEMORANDUM ORDER

Before the court are the motions of defendants Champlin Refining & Chemicals, Inc. ("Champlin"), CITGO Petroleum Corporation ("CITGO", and the Termination Pay Plan for Salaried Employees of Champlin Refining & Chemicals, Inc. (the "Termination Plan") to dismiss, under Fed. R. Civ. P. 1 2(b)(6), the claims against them.[1] Also before the court is the

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"By their Amended Complaint, Plaintiffs . . ., with Defendants' agreement, dropped as defendants the Pension Plan for Exempt Salaried Employees of Champlin Refining & Chemicals, Inc. and Messrs. Tomlinson and McAlister, and named in their stead the Termination Pay Plan for Salaried Employees

plaintiffs' motion for partial summary judgment on the defenses of release and ratification. For the reasons stated below, the defendants' motion to dismiss is granted and the plaintiffs' motion for partial summary judgment is denied.

I. BACKGROUND

In September, 1990, Champlin informed all of its employees that it would become a wholly-owned subsidiary of CITGO at the end of the year, resulting in the closure of Champlin's headquarters in Irving, Texas. In November, Champlin notified plaintiffs of itS intention to terminate each of their positions. Before those respective dates of termination arrived, each plaintiff received a letter from Champlin concerning termination pay. Attached to the letter was a notice of release which provided that Champlin would pay certain severance benefits to the terminated employee in exchange for a release of all potential claims. The notice further provided that the employee had a forty-five day period within which to accept or reject the release, and a seven day period within which to revoke any acceptance of the release. Each of the plaintiffs was terminated before the fortyfive day period for such consideration had expired.

Each plaintiff executed the release and thereupon received, as consideration for the release, severance benefits to which he

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of Champlin Refining and Chemicals, Inc." Plaintiffs' Motion for Partial Summary Judgment at 2 n.1 March 20, 1992).

or she would not otherwise have been entitled. The amount of monetary consideration received by each plaintiff for execution of the release ranged from $25,000 to $90,000, and the total payments to all plaintiffs exceeded $250,000. On April 26, 1991, plaintiffs -- through their counsel -- made written demand on the defendants for additional termination benefits, asserting that the releases were invalid and obtained under duress. Plaintiffs then filed age discrimination charges with the United States Equal Employment Opportunity Commission (the "EEOC") in May, 1991, and brought the instant action on January 13, 1992. In each proceeding, plaintiffs again disputed the validity of the releases and claimed duress in their execution. Plaintiffs have neither tendered, nor offered to tender, a return of the benefits received for execution of the releases.

II. ANALYSIS

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law.[2] Fed. R. Civ. P. 56(c). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Sims v. Monumental General Insurance Company, 960 F.2d 478, 479-80 (5th Cir. 1992) (citing Matsushita Electric Industrial

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[2] Because the court has considered matters outside the pleadings in ruling on defendants' motions to dismiss, the court will consider them as motions for summary judgment. Rule 12(b), F.R. Civ. P.

Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 587 (1986)).

The disposition of a case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." Fontenot v. Upjohn Company, 780 F.2d 420 1190, 1197 (5th Cir. 1986). The Fifth Circuit has held that the moving party is entitled to summary judgment when the nonmoving party fails to make a sufficient showing of proof, id. at 1195-98, although all evidence must be viewed in the light most favorable to the motion's opponent. Gremillion v. GLJlf Coast Catering Company, 904 F.2d 290, 292 (5th Cir. 1990). Summary judgment may be entered against a party if after adequate time for discovery, the party fails to establish the existence of an element essential to his or her case and as to which he or she will bear the burden of proof at trial. Ce/otex, above, 477 U.S. at 32426.

To decide whether the releases at issue here are valid, the court must first determine whether they constituted a "knowing and voluntary" waiver of the right to pursue claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (the "ADEA"). If a waiver is executed in connection with a termination program or other severance incentive, the employee must be given forty-five days in which to consider the agreement before the waiver will be considered to be knowing and voluntary. 29 U.S.C. § 626(f)(1)(F)(ii).

Plaintiffs allege that the releases at issue are invalid because each plaintiff was terminated before expiration of the forty-five day period to which he or she was entitled under section 626(f)(1)(F)(ii). Plaintiffs have cited no case law in support of

this position, arguing instead that the provision should be interpreted to require that the consideration period not expire prior to termination, as specifically provided for in the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2102-2109.[3] In the absence of specific language in section 626 imposing such a requirement, however, the court declines to adopt the plaintiffs' interpretation. On the contrary, it concludes that the releases were "knowing and voluntary" within the meaning of section 626.

The plaintiffs further assert that the releases, even if they are otherwise valid, were obtained while they were under economic duress and are therefore unenforceable. The court agrees that duress may avoid a contract, including a release. See Palmer Barge Line, Inc. v. Southern Petroleum Trading Co., Ltd., 776 F.2d 502, 505 (5th Cir. 1985), and cases cited therein. Even if duress were established here, however (and that is a matter very much in dispute), the Fifth Circuit has held that the retention of benefits received as consideration for executing a general release of claims for employment discrimination constitutes a ratification of the release sufficient to overcome any claim of duress, and that this ratification bars the employee from pursuing claims of discrimination. Grillet v. Sears, Roebuck & Company, 927 F.2d 217, 220 (5th Cir. 1991) (citing with approval Widener v. Arco Oil and Gas Company, 717 F. Supp.

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The plaintiffs do not dispute that they had forty-five days to consider whether to execute the release. Rather, their contention is that defendants were required by federal law to keep them on the payroll throughout this forty-five day period, and it is undisputed that plaintiffs' pay and benefits did not, due to termination, continue for that entire time.

1211 N.D. Tex. 1989)). Because it is undisputed that the plaintiffs here have failed to return to the defendants any of the benefits they received as consideration for executing the releases, this case is controlled by Grillet. Plaintiffs must therefore be deemed to have ratified the releases and are consequently barred from pursuing their ADEA claims. Moreover, because the releases specifically provide for the release not only of Champlin but also of its "successors, assigns, affiliates, present and former direct and indirect partners, parents, employees, officers, directors, attorneys, and agents," dismissal of the plaintiffs' claims against all of the named defendants is proper.

CONCLUSION

Plaintiffs knowingly and voluntarily executed the releases at issue here, and their continued retention of benefits received under them constitutes a ratification of those releases. Accordingly, defendants' motion to dismiss is GRANTED and plaintiffs' motion for partial summary judgment is DENIED.

SO ORDERED.

August 14, 1992.

A. JOE FISH
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-1743

ALLEN M. WAMSLEY, DONALD J. WHITTENBERG, ANTHONY J. NAGY, BETTY R. SANDERSON and GLENDA K. BENNETT,

Plaintiffs-Appellants,

VS.

CHAMPLIN REFINING AND CHEMICALS, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 12-30-93, 5 Cir., _____, _____ F.3d _____)

(September 21, 1994)

Before JONES and DeMOSS, Circuit Judges, and BARBOUR, District Judge*.

PER CURIAM:

(X) Treatment the suggestion for rehearing en bac as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled aththe request of one of said judges and a majority of said judges not having voted in favor its (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

*Chief Judge for the Southern District of Mississippi, sitting by designation.

TEXT OF 29 U.S.C. § 626 (f)

(f)(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum --

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7

days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to --

(i) any class unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 [29 USCS § 623 or 633a] may not be considered knowing and voluntary unless at a minimum --

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.